LABOR LEGISLATION AND THE CONSTITUTION[1]

ABRAM I. ELKUS

Chief Counsel, New York State Factory Investigating Commission

PRACTICALLY all our labor legislation derives its authority from what is known as the police power. There is a section in the present constitution of this state (article I section 19) which has been alluded to by the previous speakers, and particularly by Mr. Dougherty, which provides that nothing in the constitution "shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health or safety of employes."

I am rather inclined to agree with Mr. Dougherty's criticism that it is improper to limit such a provision to employes alone, as being in a measure a class provision. But after all it does seem absurd that anything should have to be put in the constitution which, in so many words, provides that nothing in the constitution shall prevent the legislature from legislating for the protection of the life and health of all the people of the state. Despite the fact that the police power of the state seems broad enough to cover legislation of the kind which we are discussing, as a matter of fact there have been three or four cases which it was claimed come clearly within the provisions of the constitution, where the courts have said that the legislation was unconstitutional. We have had the earlier workmen's compensation law declared unconstitutional because it violated the provision of "due process of law," although it provided for the protection of the lives of employes.

We have had two cases which seem in a more marked degree to come within that provision. One was where the legislature passed an act providing that women should not work in factories during the night, which the court of appeals de-

[1] Read at the meeting of the Academy of Political Science, November 20, 1914.

cared was unconstitutional, as interfering with the liberty of the individual.[1] The second was the case where the legislature passed an act prohibiting the making of cigars in tenement houses, and the courts declared the law unconstitutional.[2]

In the case relating to night work for women, it is true that the decision in part was based upon the particular facts in that case. There was nothing before either the legislature or the courts which appeared to justify a statute prohibiting women from working at night because of injury to their health or to their morals. Therefore upon the recommendation of the Factory Commission, based upon facts gathered by the commission itself, and upon observation of women working at night in the factories of the state, a statute differently worded was passed by the legislature, declared constitutional by the appellate division of the supreme court of this department, and is now before the court of appeals for its final decision.

There are four subjects for amendments or additions to the constitution which I should like to have the privilege of discussing with you to-day.

In the first place, we now have upon our statute books statutes regulating the hours of labor of women and children; that is, there are laws which provide that a woman shall not work more than a certain number of hours a week in a factory or in a mercantile establishment. There are other statutes which provide that children shall not work more than a certain number of hours a day. These laws have all been held to be a proper exercise of the power given to the legislature, and not contrary to the constitution. But the courts have held that the legislature has not the power to regulate or prescribe the number of hours during which men may work, and the first subject I want to take up is whether or not the constitution should authorize the legislature to enact such legislation.

During the course of work of the commission we found men working sixteen, eighteen and twenty hours a day. We found these men working in dust, in dirt and in grime, under con-

[1] People *v.* Williams, 189 N. Y. 131.

[2] *In re* Jacobs, 98 N. Y. 98.

ditions which seem almost impossible to describe, and which one would doubt if he had not seen them for himself. It is true that the men in most of the trades have organized; they have their own unions and associations, and with the power of association and coöperation they have been able, without legislative authority, to regulate the hours of labor in many of the trades. But it seems impossible that this form of co-operation could extend and apply to every trade and to every workingman. As long as we regard the life of the workingman as one of the greatest assets of the state, as we should, we ought by the constitution at least to authorize and empower the lawmaking body of the state to say that men shall not work longer than a certain number of hours, when existing facts make such a law necessary, and this whether the excessive hours of labor are due to the employe's desire for gain or to the cupidity of the employer.

Judge Vann, of the New York court of appeals, said:

> It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms and of adding to the resources of the country. Laws to effect this purpose by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. . . . The physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the constitution, which "presupposes its existence, and is to be construed with reference to that fact." [1]

Another matter of importance, so far as labor legislation is concerned, with which, it seems to me, the constitutional convention should deal, is empowering boards or commissions to do what has been termed by the courts as legislating, not giving a widespread power to do what they please, but within limits properly safeguarded and cared for giving them power to make more than mere rules and regulations in order to carry out statutes which are broad and general in their nature.

[1] People *v.* Havnor, 149 New York, 195.

When, after the investigations of the commission I have referred to, we drafted many laws to remedy the conditions that existed, we were bound not only by the precedent of previous legislation but by the inhibition of the constitution, as it was construed, to make detailed requirements in the statutes for the safety of men and women and children who worked, for their preservation in case of fire, and for the improvement of the sanitary conditions surrounding them in their work. We had to deal with broad general conditions, and then to state in the statute every detail we possibly could to cover every case that might come before the administrative officials for their consideration. When by statute we reorganized the labor department, we did attempt to provide for some little discretion. An industrial board, consisting of five members, was created, and to them was given power, within certain limits, to make rules and regulations carrying out more or less general statutes. The board was given power to

> make, alter and repeal rules and regulations for carrying into effect the provisions of the labor law, and to apply such provisions to specific conditions and to prescribe specific means, methods or practices to make such provisions effective. Such rules and regulations may apply in whole or in part to particular kinds of factories or workshops or to particular machines, apparatus or articles, or to particular processes, industries, trades or occupations.

It was generally thought that labor laws, like many others, should be absolutely rigid, for then there would be no discretion lodged in anyone, and consequently no abuse of discretion. But after the laws have been in effect for a year, the commission has been surprised to learn that from all over the state, from every source, the employers and manufacturers as well as the workingmen, there has arisen a demand, increasing every day, that this power to make rules and regulations should be broadened immensely and that the discretion vested in the board should be increased. To what end? Because it was found that such a board, being in close touch with the interests involved, and seeing with its own eyes the situations

about which it was to make rules and regulations, could act in a way satisfactory to all.

Now the courts did decide that a general statute could be passed and the legislature could leave to administrative officials the power, as was expressed in one opinion, "to fill in details." And in an opinion of the United States Supreme Court, Chief Justice Marshall—the greatest justice the court ever had—said that when that power was exercised, the courts would be very slow to interfere, and very hesitant to say that the exercise went beyond mere regulation, the mere making of rules. The learned justice said:

> But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.[1]

But anything beyond regulation would be beyond the power of the legislature to delegate constitutionally, being contrary to the "due-process-of-law" provisions in the state and federal constitutions. The distinction between powers strictly legislative and those which may lawfully be delegated to executive authorities is somewhat tenuous.

May not the rights, therefore, of individuals be quite as safely and properly controlled by the judgment and discretion of an administrative body—if, indeed, not a great deal more safely and properly—as by the discretion of the legislature? The courts have realized that the practical necessities of government have compelled them to overcome the objection to the delegation of power to legislate. The diversity and the intricacy of the situations calling for legislation require that undoubted authority to "fill in details" in a general statute shall be given to an administrative body, wisely and carefully chosen, whose authority shall be carefully safeguarded. Authority to a legislature to delegate its powers should be grudgingly, if not sparingly, accorded. But if labor laws are to have that broadness and elasticity necessary, then authority

[1] Nayman *v.* Southard, 10 Wheaton 1.

should be given to the legislature to grant powers which may be beyond the mere making of rules or filling in of details.

While it is true that " the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct," it is also true that the science of government is a practical one. Therefore, while each branch of government should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three coördinate parts constitute one brotherhood, that they have a common trust requiring mutual toleration of the occupancy of what seems to be a "common because of vicinage" bordering the domains of each.

One whose rights are affected by governmental action is usually protected from an arbitrary exercise of power by one official or body because concurrent action of two or more departments is required. But is this necessary in all cases? Will not an administrative body, with limited general authority, protect and preserve such rights just as fairly—nay, even more so? Surely far less complaint will be had with a law so administered.

The third proposition relates to what is known as " home work." I do not know whether many of you know that in this state, not alone in the cities, but outside, the factories send a part of the work to people to be done in their homes. Now I have no doubt that originally that was beneficial. It helped many a woman to eke out her husband's scanty pay by doing some work in her spare hours. But an investigation showed that most of this work was carried on under conditions which were distressing from the public standpoint, especially from the standpoint of public health.

In many cases foodstuffs, things that we daily eat, were manufactured in conditions that were vile beyond expression, where there was sickness, sometimes of a contagious nature, where there was filth, and in rooms where people lived day and night; and were handled by people who were unclean. Wearing apparel and clothing of every description was, and is to-day, manufactured under these conditions.

The legislature, it was thought, had no power beyond certain limits to affect this business or industry. The legislature

did prohibit the manufacture of foodstuffs in homes because it was deemed that that was within the exercise of the police power. It also prohibited the manufacture of clothing for children, because it was found that clothing so manufactured had carried with it the germs of disease to the children who wore it, and that deaths resulted as a consequence. But beyond that, all that the legislature could safely do was in some way to endeavor to regulate, by tracing the ownership of these materials.

This question is one that should come before the convention as to whether or not the legislature should be authorized to deal with the subject of making goods in the homes of the workers, either to prohibit it or to place it under such strict regulation that no harm and no injury could come to the great body of the people who use unknowingly all of these things which are made under these conditions.

There is an economic side to that problem also. The manufacturer who carries on his business in his factory must necessarily pay rent and the other expenses of carrying on his business. By making the tenement house or the home an annex to the factory, the manufacturer who does that kind of work of course saves a proportionate amount of expense, and he has an unfair advantage in the competition of business over the manufacturer who does not.

The last question which I wish to discuss is what is known as the minimum-wage question. The commission during the past year has been engaged in gathering statistics, getting exact facts as to wages paid in various employments throughout the state, so that it will be able to present to the legislature which meets next year, and also to the convention, a multitude of facts and figures upon which both the legislature and the convention may base action.

New York has long been accustomed to legal protection of its workers as to conditions under which labor is carried on. Regulation, by law, of wages in private employment is comparatively new in any state of the Union. Massachusetts began with the provisions for a wage commission in 1912, and since then eight other states have enacted some kind of wage legislation.

That the legislature should be authorized to enact such legislation is far better than to have such legislation enacted and then go through the agonies of testing its constitutionality. The constitution need not commit itself to the principle of the minimum wage, if its framers are either undecided or adverse, but no harm, and only good, can come if power be given to the legislature to provide for a minimum wage if it deems it advisable. Despite the fact that authority may be found for sustaining a minimum-wage law under our present constitution, it would be far better to enact some suitable provision authorizing the legislature to do what it wishes in this matter.

It is true that law is a progressive science, and it has been well said that while the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government.

The state uses all its power to conserve its great natural resources and assets—its rivers and streams, its trees and forests, its land, its animals, fish, fowl and mineral wealth—and the constitution should give every power to the legislature to enable it to conserve its greatest asset—human life. To regulate labor fairly and properly means that our hospitals will not have so many inmates, sick and maimed; our people will not grow old or die before their time, or be sick when they should be well—an economic gain not alone to those who work but to all the people of the state.